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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1187

BERTHA FRIEND, MIDDLE ATLANTIC TRANSPORTATION COMPANY, AND MILBURN MARTIN,
Petitioners,

vs.

FRED J. FRIEND,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF.

PHILIP R. SHIFF,
Counsel for Petitioners.

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vs.

FRED J. FRIEND,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent:

A

Summary Statement of Matter Involved

The petitioner Bertha Friend brought an action against the petitioners Middle Atlantic Transportation Company and Milburn Martin to recover damages for personal injuries sustained as a result of a collision between an automobile operated by respondent Fred J. Friend, in which the petitioner Bertha Friend was a passenger, and a motor truck owned by petitioner Middle Atlantic Transportation Company and operated by petitioner Milburn Martin, its servant and agent (R. 4-6).

This suit was originally brought in the state court, but was removed by the defendants to the federal court, there being diversity of citizenship between the plaintiff and the defendants (R. 7). The defendants then impleaded respondent Fred J. Friend, pursuant to Rule 14 (a) of the Federal Rules (Rules of Civil Procedure for the District Courts of the United States,* 28 U. S. C. A. following section 723 c) (R. 14-16). Thereafter, the plaintiff amended her complaint and claimed that her injuries were caused by negligence of both respondent and defendants originally sued (R. 21). The respondent moved to strike this amendment and filed what he termed a "plea to the jurisdiction," actually a motion to dismiss (Federal Rules of Civil Procedure, Sec. 12 (b)), on the ground that there was no diversity of citizenship between himself and the plaintiff (R. 22-24). These motions were denied by the District Court (Opinion reported in 61 F. Supp. 101, and printed in record pp. 26-29). Thereafter, respondent filed answers to the plaintiff's complaint (R. 30) and to the third-party complaint (R. 31) and the case proceeded to trial and was fully heard on its merits. The trial resulted in a verdict of $6,000.00 in favor of the plaintiff against all defendants (R. 32).

On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment in favor of the plaintiff was reversed as to the defendant-respondent Fred J. Friend, but was affirmed as to the defendants-petitioners Middle Atlantic Transportation Company and Milburn Martin, the court being of the opinion that the District Court could not exercise jurisdiction over the plaintiff's claim against respondent, because there was no diversity of citizenship between them (opinion reported in 153 F. (2d) 778; printed in record at pp. 55-58).

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* See Appendix.

B

Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, 28 U. S. C. A. section 347.

The date of the judgment to be reviewed is February 27, 1946 (R. 58).

C

Question Presented

Can a District Court exercise jurisdiction over a claim asserted by a plaintiff against a third-party defendant impleaded under Rule 14 (a) of the Rules of Civil Procedure for the District Courts of the United States, when such claim is not supported by separate jurisdictional grounds?

D

Reasons Relied On for Allowance of the Writ

1. The decision of the Circuit Court of Appeals involves an important question of procedure in the federal courts, which has not been, but should be settled by this Court.

2. The decision of the Circuit Court of Appeals apparently is in conflict with applicable decisions of this Court.

3. The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeals on the same matter.

4. The decision of the Circuit Court of Appeals is in conflict with the weight of authority on this question.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued by this Court, directed to the

United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in this cause, numbered and entitled on its docket, No. 20009, Bertha Friend *v.* Middle Atlantic Tranportation Company, *et al.*, and that the judgment of the said Circuit Court of Appeals entered on February 27, 1946, may be reversed by this Court, and that they may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and

Your petitioners will ever pray.

PHILIP R. SHIFF,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1187

BERTHA FRIEND, MIDDLE ATLANTIC TRANSPORTATION COMPANY, AND MILBURN MARTIN,
Petitioners,

vs.

FRED J. FRIEND,
Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

The Opinions of the Courts Below

The opinion in the District Court is reported in 61 F. Supp. 101 and is printed in the record at pp. 26-29.

The opinion of the Circuit Court of Appeals is reported in 153 F. (2d) 778, and is printed in the record at pp. 55-58.

II

Jurisdiction

See statement in Part B of the foregoing petition which is not repeated here in the interest of brevity.

III

Statement of Case

See Part A of the foregoing petition which is not repeated here in the interest of brevity.

IV

Specifications of Errors

The Circuit Court of Appeals erred: (1) in holding the District Court could not exercise jurisdiction over the plaintiff's claim against respondent Fred J. Friend; (2) in reversing the judgment of the District Court as against defendant Fred J. Friend.

V

ARGUMENT

1. Summary of Argument

Point A: The decision of the Circuit Court of Appeals involves an important question of procedure in the federal courts, which has not been, but should be decided by this Court.

Point B: The decision of the Circuit Court of Appeals apparently is in conflict with applicable decisions of this Court.

Point C: The decision of the Circuit Court of Appeals is in conflict with decisions of other circuit courts of appeals on the same matter.

Point D: The decision of the Circuit Court of Appeals is in conflict with the weight of authority on this question.

2. Point A: Question Involved Should Be Settled by This Court

The problem of jurisdictional requirements for third-party practice under Rule 14 (a) of the Rules of Civil Procedure for the District Courts of the United States never has been passed upon by this Court. The issue is squarely presented in the instant case. This problem is

one of considerable importance in view of the wide application of which this rule is capable. The question should be settled by this Court so that existing confusion and uncertainty as to the application of the rule may be terminated.

Magnum Import Co. Inc. v. *Coty* 262 U. S. 159, 163.

3. Point B: Conflict of Circuit Court Decision With Applicable Decisions of This Court

Even before the present rules of civil procedure were adopted, it was well established that a federal court had "ancillary" jurisdiction to complete adjudication of interrelated matters where its jurisdiction had once been competently invoked.

Moore v. *N. Y. Cotton Exchange* 270 U. S. 593;
Hurn v. *Oursler* 289 U. S. 238;
Alexander v. *Hillman* 296 U. S. 222.

Against this background, Rule 14 and Official Form 22 were adopted by this Court. (See Appendix of Forms to Federal Rules.) It is significant that Form 22, unlike the forms for original complaints omits any allegation of jurisdiction indicating that the third-party proceeding is regarded as ancillary, and does not require separate jurisdictional grounds. This view is noted in 1 Moore's Federal Practice, p. 782, and is relied upon in the following cases:

Crum v. *Appalachian Elec. Power Co.* S. D. W. Va. 27 F. Supp. 138;
Satink v. *Holland Township* D. N. J. 28 F. Supp. 67.

4. Point C: Conflict of Circuit Court Decisions With Decisions of Other Circuit Courts of Appeals

The instant case flatly holds that a plaintiff cannot assert a claim against a third-party defendant impleaded under Rule 14 (a), where the plaintiff and such party are citizens of the same state, and federal jurisdiction does not otherwise appear.

This holding is in conflict with the decision in the case of *Williams* v. *Keyes* 5 Cir., 125 F. 2d 208, certiorari denied by this Court, 316 U. S. 699, holding that the district court was not ousted of jurisdiction where the defendants after removing the action from a state court, impleaded other defendants who were of the same citizenship as plaintiff.

In accord with *Williams* v. *Keyes,* supra, is *People of the State of Illinois* v. *Maryland Casualty Co.,* 7 Cir., 132 F. 2d 850, affirming decision of District Court, N. D. Illinois, 2 F. R. D. 241.

5. Point D: Conflict of Circuit Court Decision With Weight of Authority

The narrow view of the concept of "ancillary" jurisdiction implicit in the decision of the circuit court is not in accord with the great weight of authority.

See the case of *O'Brien* v. *Richtarsic,* D. W. D. N. Y. 2 F. R. D. 42, involving impleader of a third-party joint tort-feasor in an automobile accident case. It was there said (Knight, D. J.) (p. 44):

> "While the third-party claim sets up a separate cause of action from that in the original complaint, the transactions involved in both complaints are the same and it seems to me the clearly expressed intent of the Federal Rules of Civil Procedure is that such claims might be joined as in aid of the original suit and to prevent relitigation of matters related to the

same transaction and that therefore the third-party claim is ancillary. I think this view accords with Moore's Federal Practice, Vol. 1, p. 779 et seq.; 45 Yale Law Journal 393; Clark and Moore 'A New Federal Civil Procedure'; Hughes Federal Practice, Vol. 17, Sec. 20800, p. 500, et seq."

See, also, the opinion of Judge Chesnut in *Tullgren* v. *Jasper* D. Md. 27 F. Supp. 413, 417:

> "We are dealing here with procedural matters only and there is substantial ground for the view that as the general jurisdiction of the court properly attached under constitutional and statutory provisions to the suit between the original plaintiff and the original defendant, it should proceed to do final and complete justice as between all parties affected by or liable on account of the same set of facts."

The weight of authority supports this view.

See cases collected in 1 Moore's Federal Practice, 1945, Cum. Supp. p. 356, note 1; and in Annotation 148 A. L. R. 1182, 1186 et seq.

The commentators generally have supported this view.

See:

Clark and Moore, *A New Federal Civil Procedure*, 44 Yale L. J. 1291, 1322;

Shulman and Jaegerman, *Some Jurisdictional Limitions on Federal Procedure*, 45 Yale L. J. 393, 421;

Holtzoff, *Some Problems under Federal Third-Party Practice*, 3 La. L. Rev. 408;

Federal Jurisdiction—Third-Party Interpleader—Diversity Problems under Rule 14, 40 Columbia L. Rev. 148, 153;

Federal Third-Party Practice and Diversity Jurisdiction: A Conflict, 53 Harvard L. Rev. 449, 458;

26 Va. L. Rev. 117, 376;

24 Minn. L. Rev. 126.

No better statement of the spirit and purpose of the rule (Rule 14a) and of the construction which should be accorded to it can be found than that of Judge Clark in the case of *Lesnik* v. *Public Industrial Corporation*, 2 Cir., 144 F. (2d) 968, 973:

> "These rules are a part of that fundamental tenet of modern procedure that joinder of parties and claims must be greatly liberalized to provide at least for the effective settlement at one time of all disputes of which parts are already before the court. They should therefore receive such favorable construction as is possible, consistent with due recognition of the settled principle that procedural rules cannot be used to extend federal jurisdiction or venue. Rule 82. But jurisdiction is not extended by mere devices making possible more complete adjudication of issues in a single case, when based upon jurisdictional principles of long standing, even though the effectiveness of the new devices makes their use more frequent. Cf. *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 454."

VI

Conclusion

It is therefore respectfully submitted that this case calls for the exercise by this Court of its supervisory powers, in order that the important question of federal jurisdiction and procedure here involved may be decided by this Court, and that to such an end a writ of certiorari should be granted and this Court should review the judgment of the Circuit Court of Appeals for the Second Circuit and finally reverse it.

PHILIP R. SHIFF,
Counsel for Petitioners.

APPENDIX

Rule 14. Third-Party Practice.

"(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY.—Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant."

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1187

BERTHA FRIEND, MIDDLE ATLANTIC TRANSPORTATION COMPANY and MILBURN MARTIN

Petitioners

vs.

FRED J. FRIEND

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FRED J. FRIEND IN OPPOSITION

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vs.

FRED J. FRIEND

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

I.

OPINIONS BELOW

The opinion of the United States District Court is reported 61 F. Supp. 101 and appears at pages 26-29 of the record in this case..

II.

JURISDICTION

The Judgment to be reviewed was entered on February 27, 1946 (R. 58).

The jurisdiction of this Court is invoked under Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925.

III.

QUESTION PRESENTED

Can a United States District Court exercise jurisdiction if a defendant causes a third-party to be brought into a federal civil action under F. R. 14 to answer, along with it, to the plaintiff's claim, where the plaintiff and such third-party are citizens of the same State and federal jurisdiction does not otherwise exist?

IV.

STATUTE INVOLVED

The text of F. R. 14 on Third-Party Practice appears in the appendix (page 15).

V.

STATEMENT

Plaintiff and her husband, the third-party defendant live in Plainville, Connecticut and are both citizens of this State. She brought an action in the Connecticut State Court claiming damages for personal injuries sustained by her in a collision in Plainville, Connecticut between the automobile in which she was riding, operated by her husband, and a truck owned by the defendant, Middle Atlantic Transportation Company, a New York Corporation

and operated by the defendant, Milburn Martin (one of the petitioners), its servant and agent (record pages 4-6).

The defendants brought about the removal of this action from the State to the Federal Court on the ground of diversity of citizenship and then obtained an order for the citing of her husband as a third-party defendant pursuant to F. R. 14a. Thereafter, the plaintiff amended her complaint claiming that her injuries were also due to the negligence of the third-party defendant, her husband, and the latter filed what he termed "plea to the jurisdiction"—actually a motion to dismiss, F.R. 12(b)—on the ground that diversity of citizenship was lacking between himself and the plaintiff. The District Court denied his motion, 61 Fed. Supp. 101, record page 26-29. After trial the jury rendered a verdict against all the defendants in the sum of Six Thousand ($6,000.00) Dollars (record page 32).

The third-party defendant appealed to the Circuit Court of Appeals of the Second Circuit and the judgment in favor of the plaintiff was reversed as to the third-party defendant, Fred J. Friend, but was affirmed as to the other petitioners, the Court being of the opinion that the District Court could not exercise jurisdiction over the plaintiff's claim against the third-party defendant, because there was no diversity of citizenship between them and there being no other legal basis for jurisdiction of the Federal Court. This opinion appears in 153 Fed. 2nd. 778 and in this record at pages 55-58.

VI.

SUMMARY OF ARGUMENT

A. There is no diversity of citizenship between the plaintiff and her husband the third-party defendant.

B. In Connecticut there is no contribution between joint tort-feasors. Therefore, the defendants had no cause of action against the third-party defendant.

C. There is here no question of ancillary jurisdiction.

D. There is here no "separable controversy."

E. F. R. 82 says the rules do not extend the jurisdiction of the Federal Court. Neither does F. R. 14 as it is merely a procedural rule.

F. Before F. R. 14 will support a verdict there must be jurisdiction in the Federal Court based either on diversity of citizenship or some other legal basis.

G. The decision of the Circuit Court of Appeals in this case is not in conflict with any applicable decision of this Court.

VII.

ARGUMENT

I. POINT A: There Is No Diversity of Citizenship Between The Plaintiff And Her Husband The Third-Party Defendant.

Since the Plaintiff and her husband are both inhabitants in Plainville, Connecticut and are both citizens and residents of this State, there is no diversity of citizenship since they reside here together.

II. POINT B: In Connecticut There Is No Contribution Between Joint Tort-Feasors. Therefore, The Defendants Had No Cause Of Action Against The Third-Party Defendant.

In the case of James C. Sparrow vs. Edward Bromage, et al., 83 Conn. 27; 74 A. 1070, it was held by the Connecticut Supreme Court of Errors that there was no apportionment of responsibility and no right of contribution or indemnity between joint tort-feasors; they are all liable severally as well as collectively, and therefore, a verdict against two or more for an alleged tort may be set aside as to one or more of them in respect to whom it is against the evidence, and sustained as to the others.

So in the case of Fae Wise vs. Joseph E. Berger, et al., 103 Conn. 29; 130 A. 76, the Supreme Court of Errors decided similarly that in an action against joint tort-feasors a judgment against both may be collected, in whole or in part, from either, and no right to contribution between them exists; and, therefore, the only interest which one losing defendant has in a judgment against the other—and the only cause for complaint which a directed verdict in favor of the other affords him—lies in the tenuous hope that the plaintiff might elect to collect the judgment from that source.

So also Rose vs. Heisler, 118 Conn. 632; 107 A. 66.

III. POINT C: There Is Here No Question Of Ancillary Jurisdiction.

If any action is subordinate to an action legally in Court, that tribunal has jurisdiction since it may dispose of ancillary actions on matters. If a Federal Court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that suit without regard to the citizenship of the parties, the amount in controversy or any other factor that would ordinarily determine jurisdiction.

CCA. N.Y. 1917 McCabe vs. Guaranty Trust Co. of N.Y. 243 F. 845.

CCA N.Y. 1919 Pell vs. McCabe, 256 F. 512 Modifying 254 F. 356. Cert. granted 249 U. S. 595 Affirmed 250 U. S. 573, 63 L. Ed. 1147.

Here, however, since the only possible action by the defendants is based on contribution and contribution is not allowed and since this is rather an independent suit, there is no possible action and therefore, no ancillary action.

The usual basis upon which jurisdiction over impleaded defendants has been upheld is that of "ancillary jurisdiction" that is jurisdiction to settle some claim ancillary to or in aid of a main claim admittedly within the federal jurisdiction. This was discussed at some length in Lesnik vs. Public Industrials Corp. 2 Cir. 144 Fed. 2nd. 968, and may well be resorted to where, for example, there is contribution between joint tort-feasors, and a defendant, separately sued, desires to obtain complete settle-

ment of the issues in one action. In Connecticut, however, as shown above there is no contribution between joint tort-feasors.

See Commentary, Impleader of Joint Tort-feasors, 4 Fed. Rules Serv. 900.

It appears then, that in this case, F. R. 14 has been used to extend jurisdiction so that the plaintiff has recovered against a citizen of the same state together with out-of-the-state citizens on a joint or concurrent claim upon which each is fully liable.

Precedents from other United States Districts must be examined with great care for there are at least six various legal situations, depending, also, in part upon differing state law, which may arise from litigation arising from an automobile accident. Willis, Five Years of Federal Third-Party Practice 29 Va. L. Rev. 981.

In view of the State law, this case would require an extreme extension of earlier jurisdiction concepts. Although there is much to be said for applying the concept of "ancillary" jurisdiction to the extent reasonably possible in order to get the procedural advantages of the rule, the more carefully discriminating authorities considering the possible situations have not supported its extension to cases like the present one.

> Willis: Five years of Federal Third-Party Practice, 29 Va. L. Rev. 981.
>
> Commentary, Federal Jurisdiction In Third-Party Practice 6 Fed. Rules Serv. 766.

2 Moore's Federal Practice, 1945 Cum. Supp. 356-358 citing cases.

See also Saunders vs. Baltimore & Ohio R. R. Co. D.C.S.D.W.Va., 63 Fed. Supp. 705 citing cases; Olsen vs. Jacklowitz 74 Fed. (2d) 718 (CCA 2nd 1935); Dollar SS. Lines vs. Merz 68 Fed. (2d) 594 (CCA. 9th 1934); Devost vs. Twin State Gas and Electric Co. 250 Fed. 349 (CCA 1st. 1918).

In the Second Preliminary Draft of Proposed Amendments to Rules of Civil Procedure, May 1945, Rule 14a and note thereto, this is the view taken by the Advisory Committee. It suggested a revision of F. R. 14 in order to eliminate the provision under which a defendant may, in effect, offer the Plaintiff an additional Defendant. This provision perhaps might suggest more in the way of single or consolidated adjudication of disputes than the limitations of Federal Jurisdiction permit or make possible.

IV. POINT D: There Is Here No "Separable Controversy."

The United States District Court suggested the possibility of using the idea of "separable controversy" as a springboard for jurisdiction. 61 Fed. Supp. 101, 102. If there is presented to the Court a separable controversy between citizens of different states it may be removed to the Federal Court and may thus carry the whole case along. 28 U.S.C.A. §71.

However, as the Circuit Court said whether or not that doctrine would afford the necessary springboard to justify a defendant in creating and carrying along a controversy between others who are citizens of the same state, it can have no application here. For, as the Court said, it seems quite clear that defendants who, as here, are charged with concurring acts of negligence and are freely joinable under state law cannot be considered actors in separate and separable controversies.

Pullman Co. vs. Jenkins 305 U. S. 534, 538.

Cheyne vs. Atchison, T.T.S. F.R. Co. 9 Cir. 125 Fed. (2d) 49.

Prescott vs Richards, D. C. Mass. 58 Fed. Supp. 10.

V. POINT E: F. R. 82 Says The Rules Do Not Extend The Jurisdiction Of The Federal Court. Neither Does F. R. 14 As It Is Merely A Procedural Rule.

Rule 82 states specifically that the Federal Rules are not to be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein.

The note which follows the Rules (see appendix) makes this point even clearer and stronger.

In other words, these rules give the parties no powers as to jurisdiction or venue which they did not have under Equity Rule 26 on Joinder of Causes of Action and Equity Rule 30 on Counterclaims.

"While joining a third person with the plaintiff in a counterclaim against them does not cure a defect in jurisdiction which would have existed had the counterclaim been pleaded against the plaintiff alone, the joinder may cause a defect which otherwise would not have existed. If there is diversity of citizenship between the plaintiff and defendant and the latter pleads a counterclaim entirely unrelated to the plaintiff's action, federal jurisdiction over the counterclaim nevertheless exists. But suppose that the defendant joins in the counterclaim a third person who is a citizen of the same state as the defendant, the counterclaim then does not satisfy the jurisdictional requirements and both the plaintiff and the third person may raise the objection."

Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure. 45 Yale L. J. 393 (1936).

VI. POINT F: Before F. R. 14 Will Support A Verdict There Must Be Jurisdiction In the Federal Court Based Either On Diversity Of Citizenship Or Some Other Legal Basis.

In view of the fact that the Federal Rules do not extend jurisdiction or venue of actions, no matter may be brought before a United States Court unless there exists either diversity of citizenship or some other legal basis already established which would give a Federal Court jurisdiction.

Judge Charles E. Clark who wrote the opinion in this case in the Circuit Court of Appeals wrote in the case of Brown vs. Cranston, 132 F. (2d) 631 (1942) 148 A.L.R. 1178 cert. den. 319 U. S. 741.

> "While Rule 14, unlike 193(2) of the New York Civil Practice Act, gives the defendant a right to bring in a third person 'who is or may be liable * * * to the plaintiff', in view of the decisions of the Supreme Court in Erie Co. vs. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 and Klaxon Co. vs. Stentor Electric Co. 313 U. S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477, *we do not feel justified in so construing this rule as to give the defendant a recovery which could not be obtained through any remedy available in the New York State Courts.* (Italics ours). To do so would attach a greater significance to the choice of the forum than those authorities would seem to sanction. Inasmuch as the original defendant in the case at bar could obtain no contribution in New York, if we held that Rule 14 governed, 'the accident of diversity of citizenship would * * * disturb equal administration of justice in co-ordinate state, and federal courts sitting side by side.' Klaxon vs. Stentor Electric Co. 313 U. S. 487, 496, 61 S. Ct. 1020, 1021, 85 L. Ed. 1477. Such a disposition would be contrary to the whole theory of Erie R. Co.. vs. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82L. Ed. 1188, 114 A. L. R. 1487.

> "In spite of the great convenience and advantage of applying Rule 14 in the present case we feel impelled to hold that we are precluded from doing this by the interpretation of the New York Statutes by its highest Court."

Judge Clark also wrote the opinion in Bates vs. Miller 133 F. (2d) 645 (1943) cert. den. 320 U. S. 210, where however, diversity of citizenship was complete between all the parties. There he said:—

> "That plaintiff chose originally not to make claim against these defendants became immaterial when he amended his complaint, as provided in Rule 14, to charge them with negligence. It is true that, as we have recently held, he is given the option, under the rather illusory New York law of contribution among joint tort-feasors, to decide whether or not to take a joint judgment, which is the only basis upon which contribution can be had and if he declines to accept as defendants those who have been cited in by his original adversary, the parties so impleaded must be dismissed. Brown vs. Cranston 2 Cir. Dec. 3, 1942, 132 F. 2nd 631. But here, unfortunately for appellants, plaintiff did accept the tender of additional parties, and the case is the same as if he had joined them originally."

In this case there is neither diversity of citizenship between the plaintiff and the third-party defendant nor any other legal basis which would give

the United States Court for the District of Connecticut jurisdiction of this matter since in Connecticut there is no right of contribution between joint tort-feasors.

VII. POINT G: The Decision Of The Circuit Court of Appeals In This Case Is Not In Conflict With Any Applicable Decision of This Court.

There is, of course, no decision that we have been able to find showing that this Court has ruled on the point in question. If it had its decision would be controlling.

There are various decisions in this Court such as those cited on page 7 of the Petitioners' Brief but these cases lay down rules which are well recognized but which are not in point in this case. We do not question the authority of a Federal Court to handle an ancillary matter but we claim that this case has nothing ancillary in it. We believe, however, that the decisions in this Court on related matters indicate the soundness of the rule laid down by the Circuit Court of Appeals for the Second Circuit.

This is borne out by the decision of this Court in Mitchell vs. Maurer, 293 U. S. 239. This Court said on page 243:—

> "Where the jurisdiction of a federal district court is based upon diversity of citizenship, proceedings therein in intervention being ancillary, the jurisdiction rests upon that of the main cause. Cincinnati I. & W. R. Co. vs. Indianapolis Union Ry. Co. 270 U. S. 107."

VIII.

CONCLUSION

In conclusion, your Respondent respectfully claims that since there is no contribution in Connecticut, no diversity of citizenship, no question of ancillary jurisdiction, no separable controversy and no other legal basis for giving the United States Court of Connecticut jurisdiction over the Respondent, the Petition for a Writ of Certiorari should be denied.

Respondent, Fred J. Friend

By Charles H. Blackall

George H. Cohen

Naaman Cohen

His Attorneys

APPENDIX

Rule 14. Third-Party Practice.

"(a) WHEN DEFENDANT MAY BRING IN THIRD-PARTY. — Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant."

RULE 82. F. R. JURISDICTION AND VENUE UNAFFECTED

These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.

(Note) These rules grant extensive power of joining claims and counterclaims in one action, but, as this rule states, such grant does not extend federal jurisdiction. The rule is declaratory of existing practice under the Federal Equity Rules with regard to such provisions as Equity Rule 26 on Joinder of

Causes of Action and Equity Rule 30 on Counterclaims. Compare *Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L. J. 393 (1936).*